LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 18 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1967

NO. 1103

MILDRED R. LAHMAN surviving widow and administrator of estate of John H. Lahman deceased

appellant

VS

W. E. GOULD AND COMPANY, HARRIET B. GOULD executor of will of W. E. Gould deceased and PHILIP H. MITCHEL master in chancery

appellees

APPEALS FROM THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT AND SUPREME COURT OF ILLINOIS

BRIEF OPPOSING MOTION TO DISMISS APPEAL

RAYMOND HARKRIDER
38 South Dearborn street
Chicago Illinois 60603

attorney for appellant

KEENAN PRINTING COMPANY

INDEX

PAGE

Appellees ignore the fact that in this case there are two grounds for jurisdiction of the court to review the Illinois court's decision: 1. by writ of certiorari and 2. by appeal 1, 2

While the ground supporting jurisdiction of this court by writ of certiorari arose in the trial court the ground supporting jurisdiction of this court by appeal arose for the first time in the Illinois appellate court 3

Appellees erroneously assert that procedure Lahman followed in Illinois courts contradicts claim of substantial federal questions 4

Appellees erroneously assert that validity of circuit court rule 9.3 was not timely or properly raised or passed on below 4-6

Appellees erroneously assert that Illinois court's decision rests on adequate non-federal basis 6, 7

The so-called "independent findings" of the trial court and Illinois appellate court 8

Appellees erroneously assert that Lahman does not question fairness of the trial court or the Illinois appellate court 8

Appellees misstate testimony relating to why appellees did not apply to trial court for order concerning security for master's fees 9, 10

Master was prejudiced against Lahman both as a matter of law and as a matter of fact 10

Conclusion 11

Table of Cases

First National Bank & Trust Co. v. *Evanston* 30 Ill. 2d 475 1964 4

Text Books

Stern and Gressman *Supreme Court Practice* third edition 5, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1967

MILDRED R. LAHMAN surviving widow and administrator of estate of John H. Lahman deceased

appellant

VS

W. E. GOULD AND COMPANY, HARRIET B. GOULD executor of will of W. E. Gould deceased and PHILIP H. MITCHEL master in chancery

appellees

APPEALS FROM THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT AND SUPREME COURT OF ILLINOIS

BRIEF OPPOSING MOTION TO DISMISS APPEAL

Appellant respectfully submits this brief opposing appellees' motion to dismiss this appeal.

Appellees ignore the fact that in this case there are two grounds for jurisdiction of the court to review the Illinois court's decision: 1. by writ of certiorari and 2. by appeal

1. By writ of certiorari—Under the rulings of the Illinois courts, commencing with the trial court and continuing through the Illinois appellate and supreme courts, Lahman, his estate and his creditors stand adversely af-

fected by the tainted findings of the master—a judicial officer—who throughout the crucial decision-making period while Lahman's rights were before him for adjudication was in effect on appellee loan company's payroll with a *"guarantee"* by the loan company that the loan company would pay all his fees, pursuant to which guarantee the master received from the loan company four secret payments aggregating $20,000. Jurisdictional Statement 4-8.

Thus Lahman, his estate and his creditors are deprived of procedural due process of law guaranteed by section 1 amendment XIV of the United States constitution. Jurisdictional Statement 11-16.

This court has jurisdiction to review the Illinois court's judgment by writ of certiorari under §1257(3) 28 US Code as this is a case (a) which involves the construction and application of the United States constitution and (b) in which a right or privilege is claimed under the United States constitution. Stern and Gressman, *Supreme Court Practice,* third edition pp. 70, 71.

2. By appeal—Commencing with the Illinois appellate court and continuing through the Illinois supreme court, the Illinois courts held that rule 9.3 of rules of circuit court of Cook county Illinois by implication excludes the remedy of suppression of the master's reports for the wrongful conduct of the master involved in this case. Rule 9.3 as applied and enforced by the Illinois appellate court and the Illinois supreme court is unconstitutional as violative of the due process clause of section 1 amendment XIV of the United States constitution.

Rule 9.3 is a "statute" within the meaning of §1257(2) 28 US Code—Jurisdictional Statement 17—and this court has jurisdiction to review the Illinois court's judgment by appeal under §1257(2) as this is a case where there is

drawn in question the validity of a state statute on the ground of its being repugnant to the United States constitution and the decision is in favor of its validity.

While the ground supporting jurisdiction of this court by writ of certiorari arose in the trial court the ground supporting jurisdiction of this court by appeal arose for the first time in the Illinois appellate court

The ground supporting jurisdiction of this court by writ of certiorari arose in the trial court in or about February 1964 when Lahman learned that appellees had given the master a *"guarantee"* to pay all his fees and pursuant thereto the master had received four secret payments aggregating $20,000.

Circuit court rule 9.3 is not unconstitutional on its face. The trial court did not even refer to this rule in any of its orders or decrees and did not therefore apply or enforce it unconstitutionally.

It was the Illinois appellate court that first applied and enforced rule 9.3 unconstitutionally in holding that the rule by implication excludes the remedy of suppression of the master's reports for the wrongful conduct of the master involved in this case and this unconstitutional action did not become known to Lahman until April 18, 1967 when the Illinois appellate court issued its opinion.

Thus until April 18, 1967 there was no reason for Lahman to raise any question concerning the constitutionality of rule 9.3 and his failure to do so prior to April 18, 1967 does not in anywise affect the right of Lahman, his estate or his creditors after April 18, 1967 to question the constitutionality of rule 9.3 as applied and enforced by the Illinois appellate court and Illinois supreme court.

Appellees erroneously assert that procedure Lahman followed in Illinois courts contradicts claim of substantial federal questions (appellees' motion 6, 7)—Even as to the federal constitutional questions that came into this case at the trial court level, the circumstance that Lahman appealed to Illinois appellate court rather than directly to Illinois supreme court does not impair Lahman's right to seek review of the state court's judgment by this court.

Pertinent Illinois supreme court rule 365(a) provides:

> "The taking of an appeal to either the Supreme Court or the Appellate Court shall not be deemed a waiver of the right to present any issue to the appropriate court". *Ill Rev Stat* 1967 ch 110a §365 (a)

The concluding sentence in the Illinois supreme court's opinion in *First National Bank & Trust Co.* v *Evanston* 30 Ill 2d 475 1964 at 486 is:

> "The underlying constitutional issues are not waived by an appeal to the Appellate Court."

As to the federal constitutional questions that came into this case for the first time in the Illinois appellate court as a result of the April 18, 1967 decision of that court, obviously the circumstance that Lahman appealed to the Illinois appellate court rather than directly to the Illinois supreme court cannot impair Lahman's right to seek review of the state court's judgment by this court.

Appellees do not cite any Illinois case and we do not know of any which supports appellees' assertion at page 7 of their motion that if a constitutional question appears in the course of the Illinois appellate court appeal that court would transfer the case immediately to the Illinois supreme court.

Appellees erroneously assert that validity of circuit court rule 9.3 was not timely or properly raised or passed

on below (appellees' motion 8-10)—We repeat that circuit court rule 9.3 is not unconstitutional on its face and there was no reason for Lahman to raise any question concerning the constitutionality of the rule prior to April 18, 1967 when the Illinois appellate court issued its opinion and for the first time in these proceedings applied and enforced the rule unconstitutionally.

Promptly thereafter at the first opportunity Lahman in his petition filed June 19, 1967 for leave to appeal to Illinois supreme court at page 91 contended that rule 9.3 as applied and enforced by Illinois appellate court is unconstitutional as violative of the due process clause of section 1 amendment XIV of United States constitution.

On September 26, 1967 the Illinois supreme court considered the petition for leave to appeal and denied the same.

In Lahman's motion filed in Illinois supreme court October 16, 1967 for reconsideration of petition for leave to appeal he again contended that rule 9.3 is invalid as applied by the Illinois appellate court by reason of repugnancy to the due process clause of section 1 amendment XIV of United States constitution.

On November 21, 1967 the Illinois supreme court considered the motion for reconsideration of petition for leave to appeal and denied the same.

Appellees' point that the state court did not expressly pass on the constitutionality of rule 9.3 is conclusively answered by Stern and Gressman *Supreme Court Practice* third edition at page 67:

> "In the setting of §1257 (2), an appeal will lie even though the state court is not explicit in overruling a timely challenge on federal grounds to the validity of the state statute, although the challenge itself must

be explicit. See *Largent* v. *Texas,* 318 US 418. As long as the statute is sustained, the court has necessarily rejected such an objection. Its silence in this respect is immaterial and cannot destroy the right to appeal under §1257 (2)—a result in sharp contrast with the significance under §1257 (1) of silence relative to a claimed invalidity of a federal statute or treaty. Thus an erroneous failure to pass on the federal constitutional objections to the state statute is treated as equivalent to a finding of validity within the meaning of §1257 (2), so that an appeal will lie. *Lawrence* v. *State Tax Commission,* 286 US 276, 282-3.

"The 'validity' of a state statute is also said to have been sustained, within the meaning of §1257 (2), when the state court holds the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 US 282. This is true even though the statute on its face bears no federal impediment. Thus where the court holds that a particular transaction is intrastate rather than interstate commerce and that on such basis the state statute may be applied and enforced, the validity of the statute has been sustained as to those facts. *Id.*"

Appellee's argument at page 9 of their motion concerning formal requirements of briefs in Illinois appellate and Illinois supreme courts ignores two important facts:

1. All of Lahman's Illinois appellate court briefs were due and were filed *before* April 18, 1967 when the "construction or validity" of rule 9.3 first became involved as a result of the Illinois appellate court's final decision; and

2. As the Illinois supreme court denied Lahman's petition for leave to appeal and motion to reconsider that petition Lahman did not file any briefs in the Illinois supreme court.

Appellees erroneously assert that Illinois court's decision rests on adequate non-federal basis (appellees' mo-

tion 10-12)—Appellees seem to contend that all the master did was to commit a "technical" breach of an "administrative" rule by accepting "deposits against his fees without explicit court order."

This, say appellees, constitutes the adequate non-federal basis for the Illinois court's decision.

But the facts are, according to the testimony of the master himself—Jurisdictional Statement pp 6, 7—that throughout the crucial decision-making period while Lahman's rights were before the master for adjudication the master was in effect on appellees' payroll. He stood in the position of a paid employee of appellee loan company with *"guarantee"* by the loan company that the loan company would pay all his fees, pursuant to which the master actually received four secret payments aggregating $20,000.

We know of no method by which appellees can circumvent the federal constitutional question indelibly put in this case by the master's own testimony.

This court will decide for itself facts or constructions on which federal constitutional issues rest. Stern and Gressman, *Supreme Court Practice,* third edition 113.

Appellees evidence their weakness at page 12 of their motion by stating that Lahman's contention of lack of procedural due process of law

> "reaches only the possibility of appellant being given a new trial."

This is all Lahman asks and he would be satisfied with a new trial in this court or in an Illinois court which would adjudicate the rights of the parties on the basis of the transcript of testimony and evidence in this record entirely uninfluenced by the tainted findings and conclusions of the master.

The so-called "independent findings" of the trial court and Illinois appellate court—(appellees' motion 5, 14, 16, 17)—Appellees being quite aware of the danger inherent in attempting to justify the adoption and use by the trial court and Illinois appellate court of the tainted findings and conclusions of the master, attempt to circumvent this danger by repeatedly asserting that those courts made "independent findings", that is, findings not based on or influenced by the tainted findings of the master, and that those lily-white "independent findings" are numerous and comprehensive enough to support the judgments of those courts.

In view of the fact that the trial court expressly approved the master's report and then "based on that report" proceeded to adjudicate the rights of the parties—2 abs 581-85, and the fact that the Illinois appellate court expressly held that Lahman was bound by the "findings of the master" unless he can show they are "manifestly against the weight of the evidence"—Jurisdictional Statement 10—we would be interested to learn how appellees performed the impossible task of separating the so-called "independent findings" from the findings that are based on or influenced by the tainted findings of the master.

Obviously appellees do not attempt to point out or make a list of the findings they would like to say are "independent findings."

Appellees erroneously assert that Lahman does not question fairness of the trial court or the Illinois appellate court (appellees' motion 3, 4, 14, 17)—Lahman's position is and has been that in order for the trial court and Illinois appellate court to be fair they should have suppressed the master's reports and proceeded to make find-

ings and conclusions and adjudicate the rights of the parties on the basis of the transcript of testimony and evidence in the record entirely uninfluenced by the tainted findings and conclusions of the master. But this the trial court and Illinois appellate court did not do but treated the findings and conclusions of the master as valid and gave full effect thereto. Jurisdictional Statement 9, 10.

Appellees misstate testimony relating to why appellees did not apply to trial court for order concerning security for master's fees—Appellees well knew when Lahman commenced these proceedings that Lahman was a poor person without funds and could not afford a reference to a master which would greatly increase the costs and expenses of litigation. Despite this knowledge it was appellees, not Lahman, who chose the expensive course and caused the case to be referred to the master. 2 abs 536, 537.

On June 6, 1956 at a hearing before the master appellees through then attorney Abraham stated that each side should be required to put up a substantial cash deposit so that appellees would have some assurance that appellees would not have to pay all the expenses. The master told Abraham that the master had no authority to ask for deposits and that the question of deposits should be answered over at the courthouse. Lahman's then attorney Kutner stated he would like for Abraham to file a sworn petition in court and try to get it granted. Abraham replied that he would do that. 2 abs 551.

Abraham did not petition the court for a ruling on the matter as he said he would. Instead, according to his testimony, he again initiated a discussion before the master relative to making deposits or payments on account of

master's fees at which time appellees agreed to *"guarantee"* the master's fees.

At least three reasons can be suggested why Abraham elected not to present this matter to the trial court:

1. The master's fees which had been earned and accrued at the time in question probably did not exceed $500 —2 abs 535, 536, and Abraham realized that the earned or accrued master's fees at that time were so small that the court would not look kindly on his petition;

2. Abraham realized that if Lahman so requested the court would permit Lahman to sue as a poor person and probably would require Abraham's clients to put up the deposits if any—2 abs 536-38; and

3. Abraham realized that once the matter of making deposits or payments on account of master's fees was passed on by the trial court his opportunity to use this matter either to curry favor with the master or to pressure, embarrass or discourage Lahman would be seriously diminished if not entirely eliminated.

Abraham's testimony appears at 2 abs 514-16.

At page 4 of their motion appellees assert that Abraham testified he agreed with Lahman *not* to go before the trial court for an order requiring deposits out of consideration to Lahman's financial plight.

This assertion not only misstates Abraham's testimony but also misstates the reason why Abraham elected not to apply to the trial court for an order concerning security for master's fees.

The master was prejudiced against Lahman both as a matter of law and as a matter of fact—The theory sponsored by appellees that before Lahman can complain of the tainted findings and conclusions of the master Lahman affirmatively has to prove prejudice or partiality on the part of the master is not acceptable. This would impose on Lahman a very difficult, if not impossible, task—

an unconstitutional burden—and deprive him of procedural due process of law guaranteed by section 1 amendment XIV of United States constitution. Jurisdictional Statement 11-15, 19-22.

In the instant case however the master's reports show on their face that the master was in fact prejudiced against Lahman and in favor of his benefactor, the appellee loan company. 2 abs 565-80.

Conclusion

Appellees' motion to dismiss this appeal should be denied, this court should exercise its jurisdiction and either proceed to adjudicate the rights of the parties on the basis of the transcript of testimony and evidence in the record, entirely uninfluenced by the tainted findings and conclusions of the master or the Illinois courts which are based on those findings and conclusions, or remand this case to the appropriate Illinois court with directions to so proceed.

Respectfully submitted,

RAYMOND HARKRIDER
38 South Dearborn street
Chicago Illinois 60603

attorney for appellant